No. 2822

In the

United States Circuit Court of Appeals

for the Ninth Circuit

JOHN H. MARTIN, Trustee of the Imperial Copper Company, a Corporation, Bankrupt,

Appellant,

—vs.—

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Appellee.

ADDITIONAL BRIEF FOR APPELLEE

SELIM M. FRANKLIN,
Solicitor for Appellee, Tucson, Arizona.

Filed
OCT 9 - 1916
F. D. Monckton,
Clerk.

In the

United States Circuit Court of Appeals

for the Ninth Circuit

JOHN H. MARTIN, Trustee of the Imperial Copper Company, a Corporation, Bankrupt,

Appellant,

—vs.—

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Appellee.

No. 2822

ADDITIONAL BRIEF FOR APPELLEE

SELIM M. FRANKLIN,
Solicitor for Appellee, Tucson, Arizona.

STATEMENT OF THE CASE.

John H. Martin, as Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, brought suit before the United States District Court for the District of Arizona, against The Development Company of America, a corporation, wherein, as such trustee in bankruptcy, he seeks to obtain a judgment against The Development of America, for $1,280,-686.22, with interest, and further seeks to have this judgment declared a lien upon certain property which had been mortgaged by the Imperial Copper Company to secure an issue of $2,000,000 of bonds, and which

mortgage had been foreclosed in the State Court, and which mortgaged property had been sold under said decree of foreclosure.

The lower court sustained defendant's motion to dismiss, on the ground that the complaint stated no cause of action against the defendant, The Development of America. From this judgment John H. Martin, as Trustee in Bankruptcy, has appealed to this court.

The question, therefore, presented on this appeal, is whether or not the complaint states a cause of action against the Development Company.

FACTS ALLEGED IN THE COMPLAINT

The facts alleged in the complaint are briefly as follows:

That in the year 1903 the Development Company held a contract for the purchase of certain mining properties situated at Silverbell, Pima County, Arizona, at a price of $515,000; that thereafter, and on May 2, 1903, the Development Company caused the Imperial Copper Company to be organized as a corporation under the laws of Arizona, for the purpose of having it acquire and operate the properties mentioned in the contract. (Rec. p. 2-3).

That the Development Company caused the title to all of said mining properties to be vested in the Copper

Company, and the same were operated by the Copper Company for the use and benefit and convenience of the Development Company. (Rec. p. 4). That the Development Company at all times owned and controlled "practically all of the shares of the capital stock of said Copper Company; elected its directors, officers and managers, and controlled its business. (Rec. p. 3-4).

That the Development Company, in 1903, caused the Copper Company to execute a first mortgage or deed or trust on all the mining properties so standing in the name of the Copper Company, to secure $2,000,000 of bonds issued by the Copper Company; that these bonds were issued and delivered by the Copper Company to the Development, and the Development Company "used all of said bonds and the proceeds of the sale thereof in its business of purchasing, developing and operating mines and smelting properties; and the Development Company also used all the capital stock of said Copper Company of the par value of $5,000,000, and the proceeds of the sale thereof, in the said business of purchasing, developing and operating mines and smelting properties in Arizona." (Rec. p. 5-6).

That thereafter, and some time in 1903 and 1904, the Development Company caused to be created two other corporations, to-wit: The Arizona Southern Railroad Company and the Southern Arizona Smelting Company, and caused all the shares of the capital stock of said two corporations to be issued to the Copper Com-

pany; and thereafter caused the Copper Company to pledge all of said shares as additional security for the said issue of $2,000,000 of bonds. (Rec. p. 6-7).

That some seven years thereafter, to-wit, on July 3, 1911, said Development Company "being then and there the owner and holder of and controlling a majority of said bonds, and the said shares of stock of the said Copper Company, caused a suit to be instituted in the then District Court of the First Judicial District of the Territory of Arizona, in and for Pima County, to foreclose said mortgage or deed of trust, on all of said mining properties and on said shares of stock of said Rialroad Company and Smelting Company (Rec. p. 11-12). That two days after the institution of this foreclosure suit, to-wit, on July 5, 1911, a petition in bankruptcy was filed against the Copper Company in the Territorial District Court, by certain of its creditors, and thereafter, and on July 25, 1911, the Copper Company was adjudged a bankrupt; that claims aggregating $1,-280,686.22 were filed against said Copper Company,, Bankrupt, and have been allowed. (Rec. p. 13-16). The names of the creditors and the amount of their respective claims are set forth in the complaint, from which it appears that the $2,000,000 of bonded indebtedness secured by the mortgage on the property of the Copper Company was not filed in the bankruptcy court as a claim by the respective owners of the bonds; that on August 12, 1911, M. P. Freeman was elected trustee in bankruptcy of said Copper Company and acted as such until July 2, 1914, when he resigned, and John

H. Martin, the plaintiff in the present action, was elected and qualified as such trustee. (Rec. p. 16-17).

That plaintiff is informed and believes that some agreement was entered into between the Development Company and F. M. Murphy, its President, on the one hand, and the creditors of the Copper Company, Bankrupt, on the other hand, whereby the bankruptcy proceedings should lie dormant, so as to enable the Development Company and Murphy, its President, to raise sufficient money to pay off all debts, and that in pursuance of this agreement the creditors of the Copper Company, Bankrupt, did allow the bankruptcy proceedings to lie dormant until on or about July 2, 1914, when John H. Martin became the new trustee in bankruptcy. (Rec. p. 17).

That some six months after John H. Martin had been so elected and qualified as the new trustee in bankruptcy of the Copper Company, to-wit, on December 28, 1914, The Development Company caused a decree of foreclosure to be obtained in the State Court of Arizona (successor of the Territorial court) in the suit against the Copper Company to foreclose the mortgage heretofore mentioned, given to secure the issue of $2,000,000 of bonds, and obtained an order of sale of all of the mortgaged property, including the mining properties and shares of stock; that all of said mortgaged property was sold under the forecloseure decree of the State Court, and one Leo Goldschmidt of Tucson, Arizona, became the purchaser thereof, at a price of $90,000,

for the mining properties, and $12,000 for the shares of the Railroad Company and Smelting Company; that he purchased the same for the use and benefit of the said F. M. Murphy, the President and chief officer of said Development Company. (Rec. p. 11-12).

That the action of the Development Company in causing the property to be sold under the foreclosure decree resulted in stripping the Copper Company, Bankrupt, of practically all of its assets, with the exception of certain personal property of the value of about $1400. (Rec. p. 18).

That there is not sufficient money or property in the estate of the Copper Company, Bankrupt, to pay dividends to creditors. (Rec. p. 18). That plaintiff is advised and informed, and therefore alleges, that by reason of the matters and things hereinbefore set forth, the Development Company of America became and is liable for all the debts of the Copper Company, filed in the bankruptcy proceedings, and amounting to $1,280,-686,26, with interest; and that all of the said mining properties, and the said shares of stock of said Railroad Company and of said Smelting Company, so purchased at said foreclosure sale by the said Development Company of America, or for its use and benefit, are liable for all of said debts. (Rec. p. 18-19).

Wherefore, the plaintiff prays judgment:

1. That he recover judgment against the Development Company for $1,280,886.22, being the total

amount of debts filed and allowed against the Copper Company in the bankruptcy proceedings.

2. That all of the property mortgaged to secure the $2,000,000 of bonds and sold under the decree of foreclosure be declared to be liable for the claims of the unsecured creditors of the Copper Company, Bankrupt, as filed and allowed in the bankruptcy proceedings, and that said claims be declared to be a lien thereon, and that all of said property be decreed to be a part of the assets of the Imperial Copper Company, applicable to the payment of its unsecured creditors. (Rec. p. 19-20).

POINTS PRESENTED

As the trial court held that this complaint did not state a cause of action in favor of Martin, as Trustee in Bankruptcy of the Copper Company, and against the Development Company of America, the only question in the case is whether or not the complaint does state a cause of action.

ARGUMENT

THE THEORY OF THE PLAINTIFF

The theory upon which Martin, Trustee, asks for judgment against the Development Company, is that the Copper Company was a subsidiary corporation of the Development Company, and for that reason, the Development is liable for its debts.

That the Copper Company is a corporation; that it has a corporate existence; and that as such an existing entity it could and did have property, and could and did create debts, and could and did do those acts which warranted it in being adjudged a bankrupt under the Act of Congress, are conclusively determined by the fact that it has been adjudicated a bankrupt. And that the claims filed and allowed against this bankrupt company, enumerated in the complaint, are just and valid debts against it, that it owes those debts, and that its assets subject only to prior liens, must be applied to the payment thereof, has also been adjudicated by the bankruptcy court, by the allowance of the claims, and is **res adjudicata;** this is all alleged in the complaint.

Here then arise two questions: First, is the Development Company liable for the debts of the Copper Company? Second, if it is liable, to whom is it liable; to the creditors themselves, or to the trustee in bankruptcy of the Copper Company?

We maintain that the Development Company, under the facts alleged in the complaint, is not liable for the

debts of the Copper Company. And that if it is liable, that liability is directly to **each creditor** respectively, and is not a liability to the Copper Company, for which its trustee in bankruptcy has a right of action.

We will consider the second proposition first; for if Martin, as trustee, has no right of action to enforce the liability of the Development Company, even if that Company be also liable for the debts of the Copper Company, then the question of the liability of the Development Company to the creditors of the Copper Company becomes immaterial in this case.

Martin, as Trustee, has no right of action against the Development Company.

Even if the Development Company is liable for any or all the debts of the Copper Company, on the theory that the Copper Company was only its subsidiary or agent, that liability is to the creditors themselves. It is not a debt for which the Copper Company could bring suit and recover judgment. It is not an asset of the bankrupt estate. It is simply a joint liability or debt to each creditor which each creditor has the right to enforce, if he so desires.

The Copper Company has not paid one dollar of these liabilities or debts. In the complaint it is alleged that Martin as trustee of the Copper Company, bankrupt, has not sufficient money or assets to pay any dividend whatsoever upon any of the claims filed and allowed. (Rec. p. 18).

The claims have been adjudged to be valid against the Copper Company; but the estate of that Company has not been diminished one dollar by virtue thereof, for it has no estate out of which to pay the same, and it never has or can pay them, or any part thereof.

The estate of the Copper Company, bankrupt, has no right to be reimbursed for moneys it has not and never will pay. Its trustee in bankruptcy has no right of action to recover upon a debt due directly from the Development Company to each creditor, when no part of that debt has been or will be paid by the bankrupt, or out of its estate.

The most that can be said is, that if the Development Company is liable for the debts of the Copper Company, then both companies are liable; a joint liability; a liability similar to the liability of the Development Company as joint maker or endorser of the notes, executed by the Copper Company; a liability, so far as the Development Company is concerned, which can only be enforced against it by the creditor to whom it is liable.

If, for example, any creditor mentioned in the complaint, whose claim against the Copper Company, bankrupt, has been duly filed and allowed, should bring suit to recover the same debt from the Development Company, on the theory that the Development Company was the parent corporation, and if the liability of the Development Company upon that ground was beyond question, nevertheless the Development Company

could plead as a set-off or counter claim in that suit, any debt which the suing creditor owed to it. It could make defense that the creditor, on some other account or transaction, was indebted in a larger sum to it; and by proof thereof defeat a judgment.

But if the subsidiary company, or its trustee in bankruptcy, has right of action to enforce the liability of the parent company to the creditor, on the theory that the parent company is directly liable to the subsidiary company for all debts incurred by the subsidiary company, then the parent company could **not** plead such set-off or counterclaim; for the setoff of counterclaim is against a creditor who is no party to the suit.

Counsel for appellant assert that Martin, as trustee of the bankrupt, has the right to sue the other joint debtor, who is not insolvent, and make that solvent joint debtor pay the debt **to him,** the trustee; they assert that the right of action which the creditor has against the solvent joint debtor, passes to the trustee in bankruptcy of the insolvent joint debtor, as part of tha insolvent's estate, to be realized on, converted into money, as a debt due to the bankrupt, to be administered upon as other assets of the bankrupt.

The trial court held that the right of the creditor to enforce his debt against the solvent joint debtor—the Developmen Company in the present case—was a right and property of the creditor, and was no right or asset of the bankrupt joint debtor—the Copper Company in the present case—which passed to its trustee in bank-

ruptcy as an asset of the bankrupt estate. And the court, holding that the creditors themselves, respectively, had a right of action to enforce any alleged liability or debt claimed by them against the Development Company, and that this right of action did not pass to the trustee of the Copper Company bankrupt, sustained the motion to dismiss the complaint herein. Which ruling, we submit, is correct.

Therefore, even if the allegation of the complaint, to the effect that the Imperial Copper Company was only a subsidiary corporation of the Development Company, be considered as true, nevertheless, that fact does not give a cause of action to the trustee in bankruptcy of the Imperial Copper Company to recover from the Development Company of America any of the debts which have, according to the allegations of the complaint, been adjudicated to be good and valid debts against the Imperial Copper Company itself.

Counsel for appellant have cited no cases, and we assert that no case can be found, where a trustee in bankruptcy of a subsidiary corporation has been held to be entitled to a money judgment against the parent corporation for the amount of the debts due by the subsidiary corporation.

The cases cited by counsel, which are pertinent to this point at all, are cases in which **the creditor** of the subsidiary corporation himself brought suit against the parent corporation, on the theory that as principal, the parent corporation, was liable for the debt of its agent.

Thus: In the case of Interstate Tel., Co., vs. Baltimore & O. Tel. Co. 51 Fed. 49, the suit was a creditor's bill brought by a creditor to obtain payment against the parent corporation upon a judgment obtained against the subsidiary corporation. In that case the court held, we quote from the syllabus:

> **"Held,** that as the railroad company was the sole stockholder of the Telegraph Company of Baltimore County, and appointed its officers and held it out as having authority to contract with regard to the whole system owned by the railroad company, the Telegraph Company of Baltimore County was a mere agent of the railroad company, a mere name, in fact, under which the railroad company conducted its telegraph business, and that, under the circumstances of this case, a court of equity had jurisdiction to decree that the railroad company, as principal, should pay complainant's judgment against its agent, from which it had taken all the property which it had represented that its agent controlled."
>
> Interstate Tel. Co. vs. Baltimore & O. Tel. Co. of Baltimore, 51 Fed. Rep. 49.

And so in the same case, on appeal to the Circuit Court of Appeals Fourth Circuit, reported 54 Fed. 50-55, 4 C. C. A. 180, the court held, we quote from the syllabus:

> "The fact that complainant elected to sue the agent, the telegraph company, and takes judgment against it, did not preclude it from maintaining the suit against the railroad company to compel payment of such judgment."

The case of Joseph R. Foard Co., vs. State of Maryland, 219 Fed. 827-836, 135 C. C. A. 497 was a suit

by a servant, injured in the employ of one company which was organized and controlled by another company. The court said, we quote again from the syllabus:

> "Where a ship brokerage company organized and completely controlled a stevedoring company, whose officers were its own officers, furnished its office, kept its accounts, and handled all its funds, paid its losses, and kept its profits as a charge for managing its business, the two companies were identical as to third persons, and both were liable for damages caused by the negligence of an employee of the stevedoring company in conducting its business."

Joseph R. Foard Co. vs. State of Maryland, 219 Fed. 827. 135 C. C. A. 497.

Counsel for appellant, in the present case, cite these authorities, and others of like import, all of which hold that both the parent and the subsidiary company are liable to creditors and to others having claims, as authority for their assertion that the subsidiary company itself, or its trustee in bankruptcy, can sue and recover against the parent company, for the liability of the parent corporation to the third person. But none of these cases support this contention, and no case can be found which so holds.

The allegations, therefore, of the complaint in the present case, to the effect that the Development Company of America owned all the stock of the Copper Company, and controlled its affairs, and that it was liable for all of the debts of the Copper Company, does

not state any cause of action in favor of the Copper Company, or Martin, as its trustee in bankruptcy. And whether these allegation are sufficient to state a cause of action in favor of a creditor of the Copper Company as against the Development Company, is immaterial in this case, for this is not a suit brought by any creditor.

We therefore respectfully submit that the complaint in this action does not state facts sufficient to constitute any cause of action in favor of Martin, as Trustee in Bankruptcy of the Imperial Copper Company, entitling him to a money judgment against the Development Company of America.

The Copper Company, under the facts alleged in the complaint, was not a subsidiary or agent of the Development Company.

In the foregoing argument we have shown that Martin, as trustee of Copper Company, bankrupt, has no cause of action against the Development Company, even if the Copper Company were a subsidiary corporation of the Development Company.

We will now show, that under the facts alleged in the complaint, the Copper Company was not a subsidiary or auxiliary or agent of the Development Company.

The specific facts alleged are these: That the Development Company, in 1903, held a contract to purchase for the sum of $515,000, certain mines at Silver Bell, Pima County, Arizona. (Rec. p. 3).

That the Development in 1903 caused the Copper Company to be organized; that it acquired these properties the purchase of which was $515,000, and caused the title thereto to be taken in the name of and to be vested in the Copper Company. And caused these mines to be developed and operated by and in the name of the Copper Company. (Rec. p. 4).

That the Development Company also organized a railroad company, also a smelting company, and caused all the capital stock of each of those two companies to be issued to and vested in the Copper Company. (Rec. p. 6).

That the Development Company, in 1903, caused the Copper Company to issue $2,000,000 of bonds, which were secured by a deed of trust or mortgage upon all of the property of said Copper Company, including all the said mines which were owned by the Copper Company, with the plants and equipment thereon, and all the shares of the capital stock of the Smelting Company and the Railroad Company, also owned by the Copper Company. (Rec. p. 6-11). That this entire issue of $2,000,000 of bonds and $5,000,000 of the capital stock of the Copper Company, being all of its capital stock, were issued and delivered by the Copper Company to the Development Company. (Rec. p. 6). That the Development Company sold or disposed of these bonds and sold or disposed of this stock. (Rec. p. 6). We will quote from the complaint:

> "and that the said Development Company used all of said bonds **and the proceeds of the sale thereof,** in its business of purchasing, developing and operating mining and smelting properties; and that the Development Company also used all the capital stock of the said Copper Company, of the par value of $5,000,000 and the proceeds of the sale thereof, in its said business of purchasing developing and operating mining and smelting properties in Arizona." Rec. p. 6.

Now, if the Development Company has disposed of all the bonds and capital stock of the Copper Company by using those bonds and shares, and the proceeds arising from the sale thereof, in conducting its mining business, all of which is alleged in the complaint to have been done by it in 1903, then it no longer owned or owns those bonds and stock; but divers and sundry persons who acquired the same from the Development Company were and are the owners thereof; and the Copper Company could not be a subsidiary or instrumentality of the Development Company.

There is no allegation that the property conveyed to the Copper Company was not adequate consideration for the purchase price so paid in stock and bonds. No allegation of any kind showing fraud, and no allegation of fraud even as a conclusion of law.

But it being alleged that the Development Company had disposed of these shares of stock, then the transferees or assignees of those shares became the stockholders; they became the real owners of the assets and

property owned by the Copper Company, subject only to the corporate debts.

The Copper Company could not be a subsidiary or auxiliary of the Development Company, for the Development Company was not the sole and only stockholder; it had sold or disposed of its stock.

It is further alleged in the complaint, that the Development Company not only caused the title of these mining properties to be vested in the Copper Company, but that it also caused these mining properties to be developed and operated in the name of the Copper Company. (Rec. p. 4).

And so, from 1903, when the Copper Company was organized, down to July, 1911, when it was adjudicated a bankrupt, the Copper Company operated these extensive mining properties in its own name. The mere allegation in the complaint, that the Development Company, by virtune of its stock ownership, controlled the election of the directors, or controlled its business, is not sufficient to support the allegation that it was a mere subsidiary or instrumentality or agent.

Therefore, under the specific allegations in the complaint, the Copper Company was no subsidiary or agent of the Development Company.

The Copper Company owned vast properties which it paid for with $2,000,000 of bonds secured by mortgage, and with $5,000,000 of its capital stock. Having this mining property, so mortgaged, it engaged in devel-

oping and operating its mines, from 1903 to 1911, a period of eight years.

During that time, the Development Company, which at first owned all that capital stock, disposed of it; and the Copper Company in conducting its mining operations, incurred a large amount of debts, which on the day it was adjudicated a bankrupt, in 1911, amounted to over a million dollars.

Under these specific allegations of fact, the Copper Company, according to the authorities, was not a subsidiary or auxiliary of the Development Company; it was a duly organized corporation, having its own property; conducting its own business; contracting its own debts for which it and it alone was liable.

The law on this subject is concisely stated in a case decided May 2, 1916, by the Circuit Court of Appeals, Sixth Circuit, to-wit: Pittsburg & Buffalo Co. vs. Duncan, 232 Fed. Rep. 584-588, wherein the court said:

> "The mere fact that the stockholders in two or more corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, so as to make a contract of one corporation binding upon the other, where each corporation is separately organized under a distinct charter. Central Trust Co. vs. Bridges, (C. C. A. 6) 57 Fed. 753, 6 C. C. A. 539; Richmond & I. Constr. Co. vs. Richmond, etc. R. R. Co. (C. C. A. 6) 68 Fed. 105, 108, 15 C. C. A. 289, 34 L. R. A. 625; In re Watertown Paper Co. (C. C. A. 2) 169 Fed. 252, 255, 94 C. C. A.

528. True, the legal fiction of distinct corporate existence will be disregarded when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted 'as to make it only an adjunct or instrumentality of another corporation.' In re Watertown Paper Co., supra; Gay vs. Hudson River Elec. Power Co. (C. C. A. 2) 187 Fed 12, 14, 109 C. C. A. 66; Foard Co. vs. Maryland (C. C. A. 4) 219 Fed. 827, 829, 135 C. C. A. 497. But 'it requires a strong case to induce a court of equity to consider two corporations as one, on account of one owing all the capital stock of the other.' 1 Cook on Corporations (7th Ed.) sec. 317; and see Peterson vs. C., R. I. & P. R. R. Co., 205 U. S. at page 393, 27 Sup. Ct. 513, 51 L. Ed. 841."

Pittsburgh & Buffalo Co. vs. Duncan, 232 Fed. Rep. 584-588.

We therefore submit, that under the facts alleged in the complaint, the Copper Company was not a subsidiary or instrumentality or agent of the Development Company; and the Development Company is not liable even to the creditors of the Copper Company, for the debts of the Copper Company. And for this reason also the complaint states no cause of action against the Development Company, and was properly dismissed.

The mortgaged property of the Copper Company, sold under foreclosure decree, is no longer an asset of its estate, and its general creditors have no lien thereon.

It is alleged in the complaint that in 1903 the Copper Company executed a mortgage or deed of trust upon all its property to secure issue of $2,000,000 of bonds; that

this mortgage has been foreclosed by decree of the State Court, and the property has been sold under that decree.

Martin, as Trustee, ignoring this mortgage, decree and sale thereunder, seeks also in this suit to recover that property as assets of the bankrupt estate, to be used in the payment of the unsecured creditors.

On July 5, 1911, when the Copper Company was adjudged a bankrupt, all this mortgaged property **was** an asset of the Copper Company, and by the Bankruptcy Act the title thereto did pass to its trustee in bankruptcy, subject, however, to this mortgage lien.

If the trustee, or any of the general creditors, claimed that this mortgage was **not** a valid lien on the property, they should have asserted that claim either before the bankruptcy court, or before the court where the foreclosure suit was pending.

In the complaint it is alleged that a suit was pending against the Copper Company to foreclose this mortgage, when the bankruptcy petition was filed. The foreclosure suit was brought July 3, 1911, (Rec. p. 11); the petition in bankruptcy was filed two days thereafter, to-wit, on July 5, 1911. (Rec. p. 13).

M. P. Freeman was elected and qualified as the trustee in bankruptcy of the Copper Company August 12, 1911. (Rec. p. 16). He resigned as such on July 2, 1914, on which day Martin, plaintiff herein, was elected and qualified. (Rec. p. 16).

Five months after Martin so became the trustee in bankruptcy, to-wit, on December 28, 1914, the state court in which the foreclosure suit was pending, did render its decree foreclosing the mortgage, and directed the sale of the property to pay the mortgage debt, the $2,000,000 of bonds; and the property was duly sold under this decree for $102,000. (Rec. p. 12).

The Copper Company, being a party defendant to that suit, is forever foreclosed by that decree. The validity of the mortgage; that the property therein described was liable for the mortgage debt; that the Copper Company only had an equity of redemption, which equity was foreclosed; is forever settled by the decree of the state court, if the state court had jurisdiction.

That the state court did have jurisdiction, the foreclosure suit having been brought before bankruptcy proceedings were instituted, is decided by the Supreme Court of Arizona, in the case of Martin, trustee of Imperial Copper Company vs. Bankers Trust Company, trustee for the bondholders, 156 Pac. Rep. 87-94.

In that case the court said:

> "Objection is made to the jurisdiction of the "court on account of bankruptcy proceedings. "There is no suggestion in the record that the bank- "ruptcy court thought there was any equity in the "property for the benefit of the general creditors. "The bankruptcy court is not seeking to enforce its "power and authority, whatever it may be. The "state court has never been asked to surrender the

"property, nor has the bankruptcy court indicated "that it would be willing to take possession thereof. "It is the appellant who is seeking to enforce an al- "leged jurisdiction of a court which that court has "abstained from seeking to enforce. The court in "bankruptcy did, however, recognize the jurisdic- "tion of the superior court by making an order "directing its trustee to make an application to "intervene in the foreclosure proceeding, "which the trustee did and was allowed "to become a party in intervention by the "superior court. The liens in suit were acquired "many years before the proceedings in bankruptcy, "and the foreclosure suit was pending when such "proceedings were commenced. The liens sought "to be foreclosed are nowhere in the acts of Con- "gress relating to bankruptcy denounced, but, on "the other hand, preserved and protected. In other "words, they do not belong to those classes of liens "expressly declared by the Bankruptcy Act to be "dissolved by an adjudication within four months "after they attached, nor to cases of fraud, or at- "tempted preference; but come within the rule that "the trustee in bankruptcy takes the property of "the bankrupt, subject to all such valid and exist- "ing liens as would be enforceable against it in the "hands of the bankrupt itself. The jurisdiction of "the state court to enforce the lien was not divested "by the subsequent proceedings in bankruptcy:

* * * * * * * *

"It is clear the superior court had jurisdiction."

Martin vs. Bankers' Trust Co., 156 Pac. Rep. 88-89.

Therefore, the foreclosure suit, having been brought before the bankruptcy petition was filed, the state court had jurisdiction to foreclose the mortgage, and its de-

cree therein is binding on the Copper Company, and on Martin, as its trustee in bankruptcy.

It is true that Martin, trustee, does not directly attack this decree in his complaint; but he does allege that one Leo Goldschmidt, who purchased the property at the foreclosure sale for $102,000, was the mere agent of the Development Company or of F. M. Murphy representing the stockholders and bondholders of that Company (Rec. p. 12), and he asks that the sale be ignored; that the fact that Goldschmidt, either for himself or as agent for the Development Company, or agent for Murphy, paid the purchase price $102,000 be also ignored; and that all this property be decreed to be an asset of the Copper Company, free of any lien, and be turned over to him, to be applied to the payment of the debts of the unsecured creditors of the Copper Company.

The theory upon which this startling demand is made is this: That the Development Company is liable for the debts of the Copper Company; that the purchase by Goldschmidt was in fact for the Development Company, or its stockholders and bondholders; and therefore, that the title acquired by Goldschmidt is for the benefit of the unsecured creditors of the Copper Company, because the Development Company is also liable to those creditors.

And Martin, as trustee, prays in his complaint "that "all of the said mining properties be decreed to be a part "of the assets of the said Imperial Copper Company, "bankrupt; that the jurisdiction of plaintiff, as trustee

"of said Imperial Copper Company, bankrupt, be ex-"tended to the same and that the properties be ad-"ministered upon by plaintiff as such trustee." (Rec. p. 20).

Under the laws of Arizona, the Copper Company, as mortgagee, had the right any time within six months after the foreclosure sale, to redeem the property, by repaying the $102,000 paid by the purchaser at the foreclosure sale, plus interest thereon. The statute of Arizona on this subject is as follows:

> "When a mortgage or deed of trust is foreclosed, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the same, with interest and costs. An execution shall issue accordingly, and the sale thereunder shall be subject to redemption as in cases of sale under execution."
>
> Sec. 4116, R. S. A. of 1913.
>
> "Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons or their successors in interest.
>
> (1) The judgment debtor or his successor in interest in the whole or any part of the property."
>
> Sec. 1374, R. S. A. of 1913.
>
> Redemption shall be made only by the following persons and within the following times, namely:
>
> "The judgment debtor or his heirs, executors, administrators, or grantees may redeem at any time within six months after the date of the sale."

Sec. 1375, R. S. A. of 1913.

The right of redemption, the mortgagee being a bankrupt, became vested in Martin as its trustee in bankruptcy and he had the right to redeem, under the statute, by paying the amount for which the property was sold, with interest.

However, he did not redeem. He has not repaid this purchase price. On the contrary, he comes into a court of equity and asks that court to decree that he shall be vested with all the property so sold, his time for redemption having expired, and he never having redeemed and never having paid, or offered to pay, one dollar of the money which the statute of Arizona required him to pay, if he desires to redeem. Clearly, Martin a trustee, having the right to redeem, and having failed to exercise that right, has now no further right of any kind in or to the property.

Again, and irrespective of the right of redemption given by the statute of Arizona, he who seeks equity must do equity.

Martin alleges in his complaint that the property in question was sold under decree of court to Leo Goldschmidt, and that Goldschmidt paid $102,000 to the court therefor. Whether Goldschmidt acted for himself, or as agent for the Development Company, or for Murphy, or for the stockholders and bondholders of the Development Company, as alleged in the complaint, and no matter for whom he acted, he or his principals paid $102,000 to the state court as the purchase price

of the property sold to him at the foreclosure sale; and he or they are entitled to be reimbursed this sum, before being devested of the title or property so purchased.

Before a court of equity will permit Martin, as trustee or otherwise, even to enter the threshold of justice, to assert that the title to the property so sold and paid for should be vested in him, it will require him to do equity by at least offereing to repay to the purchaser this sum of $102,000, which the purchaser so paid.

But Martin makes no such offer. He does not allege in his complaint that he ever tendered this sum, or any sum, to Goldschmidt, or to the Development Company, or to Murphy, or to anyone; nor does he allege any offer or willingness to pay this sum, or any sum, to anyone.

He boldly prays in his complaint that this property be decreed to his, as trustee of the bankrupt, to be delivered to him and administered upon by him as assets and property of the Copper Company, without himself even offereing to repay the money which the purchaser at the foreclosure sale paid therefor. Such a complaint is manifestly so void of equity that the court must dismiss it, and for that reason also the lower court was right in dismissing the bill.

The point raised by appellant, that the defendant waived its motion to dismiss for insufficient allegations of fact to constitute a cause of action, by filing its answer to the merits, has no merit for two reasons.

First, because the judgment of the lower court shows that the motion was argued and submitted to the lower

court by counsel for both the parties, on the theory that it was not waived, (Rec. p. 38-39); and this submission of the motion by both parties precludes either from now claiming that it was waived.

Second, as the complaint states no cause of action whatsoever, it could not support a judgment, and it was the duty of the court to dismiss it of its own motion.

CONCLUSION.

We therefore respectfully submit:

1. That under the allegations of the complaint, the Copper Company was not a subsidiary or agent of the Development Company, and the Development Company is not liable for its debts.

2. That even if the Development Company is liable for the debts of the Copper Company, that liability is that of a joint maker, and can only be enforced by the respective creditors to whom the liability is due, and is not a liability to the Copper Company, or its estate, which can be enforced by its trustee in bankruptcy.

3. That Martin, as Trustee of the Copper Company, Bankrupt, has no right, title or interest in the property covered by the mortgage executed by the Copper Company, for the reason that the mortgage has been foreclosed by the decree of a court having jurisdiction, and

no redemption has been made from that sale by Martin, as trustee, or otherwise.

For these reasons the complaint does not state facts sufficient to constitute any cause of action against the Development Company, and the judgment of the lower court dismissing the same upon that ground, should be affirmed.

Respectfully submitted,

SELIM M. FRANKLIN,
Solicitor for Appellee.